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Analysis of New Recovery Act Reporting Guidance

On June 22, the Office of Management and Budget (OMB) issued new guidance to federal agencies on implementing recipient reporting requirements under the American Recovery and Reinvestment Act, commonly called the Recovery Act. The guidance comes roughly four months after President Obama signed the Recovery Act into law and puts in place new requirements for the first quarterly reports that will start flowing in from grantees Oct. 10. According to the Coalition for an Accountable Recovery (CAR), "While this guidance is a step in the right direction, there is still much room for improvement."

Responsibility for implementation of the Recovery Act is shared by two government bodies – the Recovery Accountability and Transparency Board (RAT Board) and OMB. The RAT Board, chaired by Earl Devaney, oversees how funds are distributed in order to prevent fraud, waste,

and abuse. The RAT Board also has responsibility for developing and maintaining Recovery.gov, the website that Obama said will serve as the vehicle for tracking "how we're spending every dime." OMB has responsibility for instructing federal agencies on implementing the law, including what needs to be collected from those receiving Recovery Act funds, as well as what should be disclosed by federal agencies. OMB also has responsibility over the quality of the information that is disclosed.

The June 22 OMB guidance is the third from the office, all of which instruct agencies on implementing the law. The most recent guidance focuses solely on data reporting requirements under Section 1512 of the Recovery Act and only applies to recipients of grants, loans, tribal agreements, cooperative agreements, and other forms of financial assistance made available under the Recovery Act. OMB does not have authority to issue regulations or instructions on contracts that come directly from federal agencies. That authority rests with three federal agencies that comprise the Federal Acquisition Regulation (FAR) council. The FAR is expected to release regulations to implement the data reporting requirements soon.

In essence, there are two types of reporting requirements under the Recovery Act. The first is what federal agencies are to provide in weekly reports given to the RAT Board. These weekly reports are to include information about grants, contracts, loans, and other forms of payments made under the Recovery Act. That information is to be made publicly available through agency websites and through Recovery.gov. While overall information on funds obligated and paid out are on the Recovery.gov website, no other detail, such as who has received the money, is provided. To some extent, USAspending.gov provides information about who is receiving the federal funds. Overall, this part of the reporting requirements has been widely criticized by Congress and public interest observers.

The second reporting requirement concerns those who receive the federal funds. The June 22 guidance clarifies that only the prime recipient and the first-tier recipient below the prime recipient (called the sub-recipient) will need to report. In other words, if a state receives a grant and sub-grants a portion to a city, and the city sub-contracts to five entities to carry out the work, only the state and the city will need to report information. There will be no requirement to collect information from the five entities doing the actual work.

OMB notes a new website, called FederalReporting.gov, will be created to allow prime recipients and sub-recipients to submit information. OMB allows the prime recipient to either report information to FederalReporting.gov for itself and its sub-recipients or to allow its sub-recipients to report directly themselves.

However, when it comes to reporting on information about jobs created or retained, OMB only allows the prime recipient to report to FederalReporting.gov for itself and its sub-recipients. OMB states that data on jobs can either be estimates or real numbers but should not include figures for indirect or induced jobs. Indirect or induced estimates will be developed by the White House Council of Economic Advisors based on statistical models. Additionally, OMB allows prime recipients to decide for themselves what constitutes a full-time equivalent (e.g., 30 hours or 40 hours per week).

Reporting to the FederalReporting.gov website is flexible, allowing users to report directly through the web or by sending Excel files or other files in XML formats. The website will incorporate a service developed by the U.S. Environmental Protection Agency, called the Central Data Exchange, to handle data submitted in different formats and put it into a common format for the federal government. Once the data is parsed, checked for quality, and presumably standardized, it will be shared with Recovery.gov for public disclosure.

For more detailed information, see the Coalition for an Accountable Recovery website. OMB Watch is a co-chair of CAR.

House Hearing Questions Whether PAYGO is Enough to Control Spending

The House Budget Committee held a hearing on June 24 on the Statutory Pay-As-You-Go (PAYGO) Act of 2009, which was recently introduced by Rep. Steny Hoyer (D-MD). During the hearing, House members focused on the enforcement mechanisms in PAYGO, the significant exemptions granted under the proposed legislation, and whether the bill is the appropriate method to reinstate fiscal discipline in Congress.

The hearing was headlined by Peter Orszag, Director of the Office of Management and Budget (OMB); it also featured testimony from Douglas Holtz-Eakin, former Director of the Congressional Budget Office (CBO), and Robert Greenstein, Executive Director of the Center on Budget and Policy Priorities. All three witnesses testified that PAYGO is not a panacea and that additional, difficult decisions about health care spending reform and an overall re-examination of spending priorities will be necessary to combat a sustained decline in the American economy.

Orszag emphasized the primary purpose of the legislation is to avoid making the structural deficit any worse and to complement congressional PAYGO rules. Orszag also stated that PAYGO is designed to apply to both spending and to taxes because "a reduction in a revenue dollar can have the same impact [on the deficit] as an increase in spending."

As written, the act would use the threat of sequestration to force lawmakers to balance any new mandatory spending with increased revenue (taxes) or a reduction of mandatory spending elsewhere. If Congress passed legislation that did not meet these requirements (and hence was not deficit-neutral), then sequestration would result in automatic, across-the-board spending cuts to mandatory programs.

One of the major and unresolved criticisms of this version of PAYGO is its exemption of many of the provisions of the 2001 and 2003 Bush tax cuts, the Alternative Minimum Tax (AMT) patches, the expected growth in physician payment rates under Medicare, and estate tax reforms. Rep. Paul Ryan (R-WI), ranking member of the committee, was particularly perturbed by what he felt were shortcomings in the act, including the lack of annual discretionary spending caps, the exemption for expensive policies that could be deemed "emergency," and the overall growth in federal spending that he felt was unsustainable and irresponsible.

Ryan is not the only one who feels this way. Three of the exempted policies (the Bush tax cuts, the AMT patch, and the Medicare physician payment rates) were recently mentioned in a CBO report about the long-term budget outlook. The CBO report stated that without serious re-evaluation, these policies would contribute to a potentially "explosive fiscal situation." During the hearing, some members of the committee expressed concern that these exemptions gave unnecessary privileges to the policies. Orszag testified that these exemptions are necessary in order to ensure that PAYGO rules will not be waived in the future. In the past, PAYGO rules were waived for the purpose of political expediency, and the budget discipline the rules attempt to enforce never materialized. Orszag felt that by exempting these costly tax and entitlement provisions, PAYGO would be applied more consistently.

There was also discussion during the hearing about who would judge the cost of legislation that would be required to comply with the new PAYGO rules and how that analysis should be conducted. The "scoring" methodology of the act would allow the passage of legislation that is budget-neutral over a ten-year period, even if it may not be budget-neutral in a specific single fiscal year. Some members of the committee questioned the length of this scoring window and worried that unavoidable inaccuracies in projections over such a long time-frame would decrease the impact of the rules to begin with.

Several committee members also voiced concerns about who would do the scoring. The legislation would require OMB to review proposed legislation and determine violations based on the OMB's budget baseline. A few members were not comfortable with putting OMB in charge of scoring, but the U.S. Supreme Court has found that allowing the legislative branch to trigger sequestrations is unconstitutional since it allows Congress to interfere with the execution of the laws, an executive branch power. Therefore, under the structure of this PAYGO legislation, OMB must determine PAYGO violations based on the OMB baseline and then enforce sequestrations when necessary.

The hearing also sent the clear message that rising entitlement costs are being driven by a startling growth in health care costs and that this is the primary driver of the government's long-term fiscal issues. Orszag stated that health care reform is necessary in order to avoid a long-term fiscal disaster and emphasized that point throughout the hearing.

With an aging population and rising health care costs, any delay in addressing health care would result in a rise in government debt, more tax revenue diverted to pay for interest on the federal debt, and greater uncertainty about the strength and resolve of the American economy. While PAYGO is not able to solve these long-term problems, it can help to prevent the outlook from getting worse.

Open Government Directive Experiment Wraps up July 6

On Monday, July 6, the Obama administration plans to conclude the third and final phase of its innovative online process to solicit public participation in the creation of an Open Government

Directive. The process is the first of its kind for public involvement in executive branch policymaking.

The ultimate goal of this collaborative online effort is to create recommendations for the Open Government Directive, a policy document that will guide agency transparency. The effort combines the online process with a traditional input process, enabling interested organizations and individuals to provide ideas and feedback to the Office of Science and Technology Policy (OSTP) as it works to develop recommendations for the directive. Numerous parties, including technology firms such as Google, have utilized the new online tools to provide their open government recommendations to OSTP.

The first phase of the process was an online "brainstorming" session, which utilized a new media tool designed by the National Academy of Public Administration (NAPA) to solicit ideas from the public and rank them with votes. According to an analysis published by NAPA, the website received over 1,100 ideas and 46,000 votes.

The second phase was a "discussion" session that occurred on the OSTP blog. The week-long process centered on daily topics for which the public was invited to give feedback and discuss the ideas generated during Phase I.

The third and final phase involves an online collaborative writing tool – the MixedInk wiki – that allows users to submit proposals and edit the proposals of others into new versions. The site also allows the rating of developed recommendations. This phase was initially scheduled to run one week and end on June 28, but the administration extended it seven days due to increased participation late in the week.

The third phase is more targeted than any of its predecessors and includes increased moderation. The online tool breaks down each of the administration's open government principles into specific subtopics – five on transparency, five on collaboration, and three on participation. OSTP poses pointed questions for each subtopic and allows for additional ideas in each area to be submitted in open discussion forums. Off-topic recommendations can be flagged, reviewed, and subsequently moved to a different site. These are features that were not present in the previous phases, suggesting that the administration is improving its use of online tools.

The administration is expanding its use of social media tools in several other areas of policymaking, as well. On June 29, the Public Interest Declassification Board (PIDB) launched a week-long Declassification Policy Forum blog to gather public input on other transparency policies, such as declassification. PIDB is utilizing the OSTP website for this purpose.

The usefulness of new media tools for policy discussions is debatable. The forums have attracted individuals who are adamantly focused on a single transparency issue, such as securing the release of records pertaining to UFO's, while other comments are completely off-topic, such as those that focus on the legalization of marijuana or investigating the president's birth certificate. Beth Noveck, the government's Deputy Chief Technology Officer, insists, however, that with the

right framework, these tools can adequately keep the discussion on track and provide a useful forum for those inside and outside the Beltway to engage in the public policy process.

Chemical Security Legislation Begins to Move Through Congress

The House Homeland Security Committee passed legislation June 23 that would greatly reduce the risks and consequences of a terrorist attack on a chemical facility. The bill also includes small but important improvements in the accountability of the nation's chemical security program. However, industry-sponsored amendments and the continued risk of excessive secrecy during implementation diminish the value of the bill.

The legislation, the Chemical Facility Anti-Terrorism Act of 2009, would reauthorize and enhance existing security rules that are due to expire in October. The current security rules, the Chemical Facility Anti-Terrorism Standards (CFATS), were developed following passage of the Department of Homeland Security (DHS) Appropriations Act of 2007. Section 550 of the appropriations act required DHS to develop a temporary program for instituting security performance standards for high-risk chemical facilities.

Thousands of chemical facilities around the country represent potential terrorist targets – storing and processing chemicals that, if released, could become deadly clouds of gas drifting through communities. For many of these plants, there are safer alternatives to the chemicals and processes now in use.

The new legislation requires chemical facilities to assess safer chemicals and processes that would reduce the harms caused by chemical releases. The bill also provides for worker participation in identifying vulnerabilities at plants and writing security plans. The facilities that put the most people at risk would be required to implement safer alternatives, provided doing so is feasible, cost-effective, and does not shift risks to other localities. Funding is authorized to help facilities convert.

Transparency advocates view the bill's accountability measures as a significant improvement to the current CFATS, striking a better balance between withholding information that would pose a threat if disclosed and making public information whose disclosure is vital to ensuring the program is working properly. Some of the accountability measures include:

- Government-held information that is currently publicly available would remain available
- A publicly available annual progress report to Congress is required
- The DHS is directed to create a procedure whereby anyone can anonymously report vulnerabilities and other problems to the appropriate authorities, who must review and, if needed, act on the report
- Whistleblower protections are clearly spelled out in the bill

Nevertheless, transparency advocates remain concerned that too much discretion is left to the secretary of DHS on what information can be disclosed. The language of the bill could be

interpreted as allowing DHS to conceal basic regulatory data critical to evaluating the success of the program and the safety of communities near chemical plants.

Despite having won approval of four substantial amendments, no committee Republicans voted to support the bill. Several advocates supporting the bill criticized the Republican-sponsored amendments for weakening crucial features of the legislation.

The successful Republican amendments could exempt a large portion of the highest-risk plants from implementing safer alternative technologies if they are classified as a "small business concern." Other adopted amendments could slow the process and exempt facilities by requiring redundant analyses of the costs of converting to safer technologies, without consideration of their benefits, such as reduced liability, cost savings, jobs created, and reduced risks from terrorist attacks.

Republican members of the committee unsuccessfully attempted to strip from the bill the requirements for assessing and implementing safer technologies and processes. Minority amendments also sought – and failed – to limit the provision allowing citizens to sue the government or a facility for failure to meet their obligations under CFATS.

The House Energy and Commerce committee, another body with jurisdiction over the bill, will consider the legislation over the next several weeks. An additional title that adds water treatment facilities will be considered as well. So far, there has been limited activity on chemical security in the Senate, but the chamber is expected to take up the legislation once it passes the full House. The bill's supporters have stressed the importance of passing the legislation prior to the October expiration date for the current security rules.

Consumer Product Agency under New Leadership

The Senate recently confirmed Inez Tenenbaum, President Obama's pick to chair the Consumer Product Safety Commission (CPSC), the federal regulator of everything from toys to toasters. Tenenbaum's presence will likely cause a shift in the way the agency operates, including a greater focus on public protection.

The Senate confirmed Tenenbaum by voice vote on June 19. Tenenbaum is a former superintendent for education in South Carolina. She was also the co-chair of Obama's presidential campaign in that state.

Tenenbaum has pledged to operate CPSC "in an open, transparent, and collaborative way." Testifying before the Senate Commerce Committee, Tenenbaum said, "As the new Chairman, I will reassure America's families that their government can and will protect them from unknown or unforeseen dangers in the products they use." She also highlighted the safety of imported products as an issue in need of the commission's attention.

Tenenbaum takes the reins of CPSC at a pivotal time in the agency's history. In addition to the challenge of regulating imported products, the CPSC is in the midst of enforcing the Consumer Product Safety Improvement Act (CPSIA), which was passed by Congress in 2008. The bill tightens safety standards on lead in toys, all-terrain vehicles, and a class of chemicals called phthalates, which have been linked to developmental problems. CPSC's budget has risen in recent years and is scheduled to continue to increase.

Tenenbaum follows Nancy Nord, who served as acting commissioner under President George W. Bush. Currently, Nord remains at CPSC as a commissioner.

Nord's tenure at CPSC was checkered with controversy. For example, a November 2007 *Washington Post* investigation revealed that Nord and former Chair Hal Stratton had taken nearly 30 trips financed by some industries that CPSC regulates. According to the investigation, "The airfares, hotels and meals totaled nearly $60,000, and the destinations included China, Spain, San Francisco, New Orleans and a golf resort on Hilton Head Island, S.C."

Nord also opposed the CPSIA, even though it granted the agency greater authority to protect consumers and more resources to carry out its duties. The bill had broad bipartisan support and was hailed by advocates as a victory for consumers.

In May, Nord abdicated her position as acting chair and was replaced by fellow commissioner Thomas Moore. Moore, appointed by President Clinton, served as acting chair until Tenenbaum took over.

The CPSC will soon expand to a commission of five members. The expansion is set to occur one year from the date of enactment of the CPSIA, which Bush signed into law Aug. 14, 2008.

Obama has also nominated Robert Adler to serve as a commissioner. Adler is a professor at the University of North Carolina's business school. Before his career in academia, Adler served as legal counsel at both the CPSC and the House Energy and Commerce Committee.

However, since CPSC has its full compliment of three commissioners until Aug. 14, the Senate will likely wait before considering Adler's nomination.

California Seeks to Add New Chemicals to Prop. 65 List

California's Office of Environmental Health Hazard Assessment (OEHHA) is proposing to add 30 chemicals linked to reproductive harm and cancer to the state's Proposition 65 list. Proposition 65, a statute passed by California voters in 1986, requires the state to list chemicals known to cause public health problems and bars some actions that could expose people to the substances.

Under Proposition 65, the Safe Drinking Water and Toxics Enforcement Act of 1986, OEHHA is supposed to add substances annually to its list of chemicals known to the state to cause cancer,

birth defects, or other reproductive harm. The program also updates toxicity information for numerous listed chemicals each year. That list now includes approximately 775 chemicals, according to OEHHA's website.

The statute requires businesses to label products they sell with information about the chemical contents of the products and to disclose the release of chemicals into the environment. According to the website, the law also prohibits businesses from "knowingly discharging significant amounts of listed chemicals into sources of drinking water."

There are different ways that chemicals are proposed for Proposition 65 listing. OEHHA has a scientific advisory board that consists of two committees that may propose chemicals for listing. In addition, if an "authoritative body," as recognized by one of these two committees, identifies a substance as a carcinogen or a cause of birth defects or reproductive harm, OEHHA can list the chemical. Authoritative bodies include the U.S. Environmental Protection Agency, the Food and Drug Administration, the National Institute for Occupational Safety and Health, and the National Toxicology Program. The chemical may also be listed if it is identified by the California Labor Code as causing cancer or reproductive harm.

The proposal to list the additional chemicals comes after court challenges from environmental and labor groups and from industries affected by the statute, according to a June 16 BNA article (subscription required). Environmentalists claimed OEHHA has been too slow to list chemicals. Industry opposed the listing method that relies on the labor code to identify chemicals. The cases were then consolidated. BNA reports that the Alameda County Superior Court in *Sierra Club v. Schwarzenegger* upheld the legality of listing chemicals through the labor code. Therefore, the state did not need to conduct additional scientific review, the court said.

OEHHA is now required to move forward with additional rules to clarify how and what chemicals can be listed annually under the labor safety standards, according to a press release by the Natural Resources Defense Council, a party to the suit. OEHHA's announcement June 12 is the first result of the court's decision.

OEHHA's has proposed to list 30 new chemicals. The list contains both carcinogens and reproductive toxins. Among the carcinogens to be added are: styrene, marine diesel fuel, a category of herbicides, vinyl acetate (used in the production of plastics, paints, and adhesives), and wood dust.

The proposed chemicals impacting reproduction include chloroform, toluene, several types of ethers, ethylene oxide (an industrial gas used in the production of chemicals for medical sterilization), carbaryl (a common pesticide), and the refrigerant methyl chloride, according to BNA.

California could soon list bisphenol-A (BPA) as well, according to a June 18 *Los Angeles Times* blog post. BPA is a compound used in hard plastics and the lining of food cans that has been linked to developmental disorders. The state Senate has passed a bill that bans the use of BPA in

children's food and drink containers, and a July public hearing will explore whether the chemical should be on the Proposition 65 list.

In the case of BPA, however, California is following in the footsteps of some other state and local governments that have already moved to ban the substance. For example, Connecticut passed a law June 4 with similar children's food and drink container provisions. The law is scheduled to go into effect Oct. 1, 2011. Minnesota became the first state to ban BPA in children's products when it passed a bill in May requiring BPA-free containers by 2011. In addition, Chicago and Suffolk County, NY, have passed BPA bans.

Although many manufacturers have voluntarily stopped using BPA in their products, some industry groups insist that the evidence against BPA is too uncertain to justify regulations and have begun a marketing campaign to thwart the movement by state and local governments, according to a *Washington Post* article. As more jurisdictions begin to limit or prevent products containing BPA from entering the marketplace in the absence of federal action, the historical trend of business supporting one federal standard (versus multiple standards) is likely to be repeated. California's decision to add BPA to the Proposition 65 list could be a significant trigger to federal action. Moreover, the Food and Drug Administration has already begun a scientific review of its policy on BPA, according to the *Post*.

Obama Administration Asks for Public Views on E-Rulemaking

The Obama administration is asking for feedback on its efforts to include the public in regulatory decision making. E-rulemaking allows citizens and stakeholders to comment on regulations and other government documents online, but existing challenges have limited public participation.

The federal government launched its e-rulemaking program in 2002. The intent of e-rulemaking is to give interested citizens and stakeholders a one-stop location to view documents related to a pending regulation and to file comments on regulations. Almost every federal rulemaking agency has incorporated its online rulemaking docket into the government-wide system.

Despite its potential to expand and facilitate participation, the e-rulemaking system has fallen short of expectations. One of the major challenges has been public education: many citizens simply are not aware of how regulations affect them or do not know where and how to comment on regulations.

The public site for accessing documents and commenting on regulations, Regulations.gov, has already gone through several changes, most as a result of usability issues. However, problems remain. For example, the search and sort functions are limited, making it difficult for users to easily find what they are looking for. Regulations.gov also does not provide adequate options for users to be notified of new information about a proposed rule or about updates posted online.

The Obama administration has launched a site to preview upcoming changes on Regulations.gov and to solicit more ideas on ways to improve the site. Regulations.gov/Exchange allows users to submit their ideas and feedback in a blog format.

Comments on Regulations.gov/Exchange have given the administration's reform effort mixed reviews. Some commenters praised the proposed changes, while others said they do not go far enough to make Regulations.gov more user-friendly.

The White House also included e-rulemaking as one topic in its Open Government Initiative – an effort that allows users to post ideas online and rate the ideas of others.

The comments on the e-rulemaking post in the Open Government Initiative received a relatively low number of comments, 31, compared to some other posts on different transparency and participation issues, which exceeded 100 comments. Several commenters encouraged the administration to expand participation in rulemaking by adopting interactive web tools such as wikis or rating systems that would allow users to endorse others' comments. Commenters also called on agencies to improve outreach efforts so more citizens are notified when an agency undertakes a rulemaking.

The Open Government Initiative is in its final phase – users are now able to collaboratively craft policy recommendations online. Thus far, comments on the "Improving Online Participation in Rulemaking" topic generally call on the government to do a better job of publicizing rulemaking activity and the rationale for decisions. Comments have focused less on the mechanics of how users access and comment on regulations.

The final drafting phase of the Open Government Initiative lasts through Monday, July 6. Regulations.gov/Exchange will continue to take comments through July 21.

In 2008, the American Bar Association (ABA) released a report calling for an overhaul of the federal e-rulemaking system that would be more aggressive than what has been previewed on Regulations.gov/Exchange. The report includes some recommendations made by users during the Open Government Initiative but also includes many others.

The report, *Achieving the Potential: The Future of Federal e-Rulemaking*, was written by regulatory and open government experts from outside the government. The authors wrote the report to provide the administration and Congress with a comprehensive roadmap for reforming e-rulemaking.

Among other things, the report recommends:

- An improved search function that allows users to better define search parameters and sort results
- The use of innovative techniques such as wikis and blogs to stimulate participation
- The creation of comment portals on individual agency sites in addition to the current, centralized portal found at Regulations.gov

- The formation of a public committee to advise the federal government on the status of, and changes to, the e-rulemaking system
- Greater and more consistent funding for e-rulemaking efforts (currently, a dedicated funding source does not exist, requiring agencies to divert funds from other activities)

Supreme Court Upholds "Preclearance" Provision in 1965 Voting Rights Act

The U.S. Supreme Court upheld the "preclearance" provision in *Northwest Austin Municipal Utility District No. 1 (NAMUDNO) v. Holder*, a case in which a small utility district in Texas challenged Section 5 of the Voting Rights Act of 1965. Section 5, reauthorized by Congress in 2006, applies to all or parts of 16 states. It requires those states to get federal approval before changing election rules or procedures, due to past laws and practices that discriminated against and disenfranchised racial minorities. This provision is referred to as the "preclearance" provision.

The Court concluded that NAMUDNO had the ability to seek a statutory exemption from the preclearance requirements of Section 5 of the Voting Rights Act. The Court's decision preserved all aspects of Section 5, but it overruled a lower court decision that NAMUDNO was ineligible for the exemption. The preclearance requirement has been one of the most successful provisions of the Voting Rights Act, deterring and preventing many voting changes that would have harmed minority electoral participation and representation.

The utility district wanted a bailout, but Section 5 says that only a state or political subdivision that registers voters can petition for a bailout. The utility district does not register voters, so the statutory language indicates that it cannot seek an exemption, or "bail out," of the provision.

The decision to allow the utility district to petition for an exemption allowed the Court to uphold Section 5 while avoiding constitutional questions surrounding Congress's reauthorization of the provision. Instead of directly addressing whether it was constitutional for Congress to reauthorize the provision, the Court, by an 8-1 majority, agreed that the utility district in Texas was entitled to petition for an exemption. The decision came as a relief to civil rights groups and can be seen as a temporary victory for proponents of Section 5, particularly after oral arguments seemed to indicate that Section 5 could be struck down.

"The Court avoided the constitutional question whether Section 5 exceeds congressional power because there's not enough evidence of intentional discrimination by these covered jurisdictions through a holding that the utility district is entitled to ask for bailout," according to Rick Hasen, a Loyola law professor and moderator of the Election Law Listserv.

Justice Clarence Thomas was the only justice to dissent, but his dissent, which was based on constitutional grounds, still may be a precursor to how the Court ultimately decides the constitutionality of Section 5. "The violence, intimidation and subterfuge that led Congress to pass Section 5 and this court to uphold it no longer remains," Thomas claimed.

Thomas' words, which suggest that Section 5 is not needed in today's political climate, serve as an indication that in future cases, the Court may narrow or even overturn a pivotal finding in *City of Boerne v. Flores*, a 1997 case concerning the scope of Congress's enforcement power under the fifth section of the Fourteenth Amendment. The current decision by the Court not to consider the key constitutional issue may also serve as notice to Congress to produce evidence that covered jurisdictions still engage in discriminatory acts or would do so if they were not covered by Section 5. Chief Justice Roberts wrote in the majority opinion, "The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions."

Civil rights groups, however, believe that Section 5 is still important. "Without [Section 5's] protections, our nation would unnecessarily face the grave risk of significant backsliding and retrenchment in the fragile gains that have been made," said John Payton, Director-Counsel for the NAACP Legal Defense Fund, one of the groups that argued before the Court to keep Section 5's provisions intact.

The outcome of this case is important to nonprofits because it affects constituents often served by nonprofit organizations. Nonprofits have been instrumental in helping to ensure that voters are not disenfranchised and that underrepresented groups are adequately counted in the Census. Supporters of the law have noted that by avoiding the constitutional issue, the Court ensured that Section 5's "provisions probably will be in place to guide the electoral redistricting plans required by the 2010 census," according to the *Washington Post*.

Supreme Court Decides to Rehear Citizens United Case

On the final day of its 2008-2009 term, the U.S. Supreme Court decided not to issue a ruling in *Citizens United v. Federal Election Commission (FEC)*. Instead, the Court will rehear the case Sept. 9, before the next term officially starts in October. The case challenges the Bipartisan Campaign Reform Act's (BCRA) prohibition on corporate electioneering communications.

Citizens United, a 501(c)(4) nonprofit organization, charges that ads for its 90-minute film, *Hillary: The Movie*, should not be subject to donor disclosure and disclaimer requirements. The rehearing will address whether the Court should overturn *Austin v. Michigan Chamber of Commerce* and related sections of *McConnell v. FEC*, two cases that upheld restrictions on electioneering communications. The case has now expanded and could have major implications for nonprofit groups and other corporations who want to weigh in on policy before an election.

Electioneering communications are broadcast messages that refer to a federal candidate 30 days before a primary election and 60 days before a general election. Section 203 of BCRA prevents corporations (including nonprofits) and labor unions from funding electioneering communications out of their general treasury funds. Any group airing an electioneering communication must identify anyone who contributed at least $1,000 since the beginning of the previous year. Citizens United says a lower court erroneously applied the campaign finance law

to its film and organization. The group also argues that BCRA "imposes sweeping restrictions on core political speech."

Citizens United wanted to make the film available for free via cable video-on-demand service during the 2008 presidential primary and accepted some for-profit corporate funding. A federal district court ruled against the group and found that the movie was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office."

The Supreme Court's rehearing order states, "The parties should address the following question: 'For the disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce* and the part of *McConnell v. FEC* which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002?'"

The Court has asked that both sides file their opening briefs by July 24. The new briefs have to address the ruling in *Austin*, which upheld a state law prohibiting the nonprofit Michigan Chamber of Commerce, funded by dues from for-profit corporations, from running print ads supporting a candidate. The Court found a compelling state interest in preventing corruption or the appearance of corruption by reducing the chance that corporate treasuries influence the outcome of an election.

Citizens United's original brief called for *Austin* to be overturned, arguing that the case was "wrongly decided and should be overruled because it is flatly at odds with the well-established principle that First Amendment protection does not depend upon the identity of the speaker."

The electioneering communications rule was revised by the FEC in 2007 after the Supreme Court decided *Wisconsin Right to Life (WRTL) v. FEC*. The revisions limit the electioneering prohibition to ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." In *WRTL*, Justices Kennedy, Scalia, and Thomas argued that *Austin* should be overruled.

If the electioneering communications provision is struck down, there could be major consequences for the political landscape and the ads voters see during future election seasons. Instead of ruling narrowly as expected, the Court decided to broaden the case, with a new focus on whether two previous rulings on spending restrictions in BCRA should be overturned. The case may now be used to address the constitutionality of campaign finance laws, as well as broader free speech questions.

Scott E. Thomas, a former FEC chairman, told *CQ Politics*: "[T]he Supreme Court will consider whether corporations and unions can go ahead and can spend unlimited amounts of their shareholders' money or union dues on hard-hitting, negative attack ads that are full-fledged express advocacy. That has to have the American public a little frightened of what they're going to see on their television sets. They're already sick of the saturation that they already see."

The composition of the Court may be different by the time it rehears the case, with the possible inclusion of President Obama's nominee, Judge Sonia Sotomayor. According to SCOTUSBLOG,

if the Senate approves Sotomayor, "she could be on the bench for the Sept. 9 argument. [I]f she is not however, she could participate in reviewing the case by reading the briefs and listening to the audiotape of the oral argument."